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Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.

**Re:** DOT Docket ID Number OST-2009

Dear Sirs:

Nothing would please me better than doing away with all set aides, that being stated I have the following comments.

1) It would be helpful if the term construction was either defined as new work or not new work.
2) It would be helpful of the terms bundling and consolidating were clarified. The corps of engineer has wrote an entire book trying to justify consolidating without bundling.

I have attached the pros and con position on bundling of construction of a recent case.

**Please call me if you have any questions**

**Charles P. Tyler**
**President**

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## II. THE CONSOLIDATION AND BUNDLING STATUTES DO NOT APPLY TO THIS PROCUREMENT OF NEW CONSTRUCTION

Tyler has argued that the Corps violated the consolidation and bundling provisions that appear in 10 U.S.C. § 2382(b) and 15 U.S.C. § 644(e), respectively. Tyler's complaint and preliminary injunction motion focused upon the issue of bundling. Tyler's motion for judgment concentrates upon consolidation, but still refers to bundling from time to time. The consolidation and bundling statutes animate the same small business policies, use virtually the same language, and express the same limitation that certain combinations of existing requirements must be "necessary and justified." See 10 U.S.C. § 2382(b)-(c); 15 U.S.C. §§ 632(o), 644(e). These two statutes, however, do not apply to new construction, which is a new requirement.

The consolidation and bundling statutes, by their terms, apply only to contracts that would combine existing requirements, previously provided, under separate smaller contracts. 15 U.S.C. § 632(o) ("The term 'bundling of contract requirements' means consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts ...") (emphasis supplied); 10 U.S.C. § 2382(c)(1) ("The terms 'consolidation of contract requirements' and 'consolidation' ... mean a use of a solicitation to obtain offers for a single contract or multiple award contract to satisfy two or more requirements ... for goods or services that have previously been provided ... under two or more separate contracts smaller in cost ...") (emphasis supplied). A contract to design and build a new building, a barracks facility that will rise from the ground where none existed before, is a new requirement, not an existing one. Therefore, the Solicitation is not subject to the bundling and consolidation statutes.

The question of whether the bundling and consolidation statutes apply to construction contracts appears to be a matter of first impression for the Court. We are not aware of any bid protest decision that interprets the "previously provided" element in the context of bundling, and we are not aware of any bid protest decision that interprets the consolidation provisions. In addition to the plain language of the statutes discussed above, however, there is regulatory and legislative activity that confirms these statutes do not apply to new construction.

The United States Small Business Administration ("SBA") has interpreted the "previously provided" concept as it relates to construction contracts. The SBA, the agency charged with the protection of small business concerns, 15 U.S.C. § 633, has acknowledged in its formal regulations that "[c]onstruction contracts, by their very nature (e.g., the building of a specific structure), are deemed new requirements." 13 C.F.R. § 124.504(c)(1)(ii)(B). "A new requirement is one which has not been previously procured by the relevant procuring activity." 13 C.F.R. § 124.504(c)(1)(ii). According to the SBA's reasoning, new construction contracts, by their very nature, cannot be a "consolidation" or "bundling" of existing requirements.

The SBA's interpretation of "previously provided" is confirmed by legislative activity in Congress. On May 11, 2007, the United States House of Representatives passed The Small Business Fairness in Contracting Act, H.R. 1873, 110th Cong. (2007). The bill, which is pending in the Senate, would expand the definition of bundling in 15 U.S.C. § 632(o) and

include combinations of "requirements for construction services of a type historically performed under separate smaller contracts." H.R. 1873 § 101. According to the House report, this change in the law would "add[] construction services to those contracts that are subject to a bundling analysis mandated by 15(e) [15 U.S.C. 644(e)] of the Small Business Act." H.R. Rep. No. 110-111, pt. 1, at 6-7 (2007). The House Committee on Small Business explained: "Under the current definition, a contract may only be considered bundled if it has been previously performed. This provision expands the definition to include construction and other new work." Id. at 15. There would be no need for the House of Representatives to pass H.R. 1873 if the bundling or consolidation statutes already applied to contracts for new building construction.

Finally, Tyler mistakenly argues that "the Administrative Record appears to concede" that the Solicitation is subject to the consolidation statute. Pl. Br. 42. In the absence of judicial precedent, and in an abundance of caution, the Corps undertook the burden of complying with the consolidation statute, rather than assume the risk that an incorrect legal interpretation might derail this vital military procurement. See, e.g., AR 15, 24. As a matter of administrative prudence, the Corps prefers to do more than the law requires until the Court has an opportunity to rule upon this issue of first impression and national importance.

For these reasons, the bundling and consolidation statutes do not apply to contracts for new construction. Accordingly, there can be no violation of these provisions.

If, however, the Court finds that the consolidation statute applies to new construction requirements, then the Court should determine whether the Corps had a "rational basis" for finding that the combination of multiple barracks requirements in a single IDIQ contract was "necessary and justified." AR 15, p. 264; 10 U.S.C. § 2382(b)(1)(c); 15 U.S.C. § 644(e)(2)(A). For all of the same reasons discussed in Argument section III, and as detailed further in the Acquisition Strategy (AR 15, pp. 2-170), the Acquisition Plan (AR 24), and the Consolidation Memo (AR 15, pp. 246-64), the Corps had a rational basis for this finding.

**II. Defendant's Claim That "The Consolidation And Bundling Statutes Do Not Apply To This Procurement Of New Construction" Is Incorrect, And Also Fails To Answer The Main Thrust Of Plaintiff's Contention That Defendant Is Subverting The Interests Of Small Business Concerns In Contravention Of Statutory Requirements**

In its opening brief, Plaintiff argued that "Defendant has perverted the intention of 17 Congress by consolidating construction contracting into unduly large MATOC solicitations which ignore and subvert the interests of small business concerns" – and specifically, small business concerns such as Plaintiff, which are not socially or economically disadvantaged. The Defendant counters with a technical argument that, because the construction at issue is "new," it does not fit the definition of either "bundling" or "consolidation," and that, therefore, the Defendant is under no duty to accommodate the interests of this small business Plaintiff or of others in its class. This argument is faulty for a number of reasons.

First of all, the Small Business Act itself does not merely prohibit bundling as provided in 15 U.S.C. § 631(j)(3), but also places upon each federal agency the affirmative duty "to the maximum extent possible . . . to foster the participation of small business concerns as prime contractors, subcontractors and suppliers" and to "structure its contracting requirements to facilitate competition by and among small business concerns, taking all reasonable steps to eliminate obstacles to their participation. 15 U.S.C. § 631(j)(1)-(2)(emphasis added). See also, to similar effect, 13 CFR 125.2(d)(2)(i)-(ii). Similarly, 15 U.S.C. § 644(a) provides that "small business concerns shall receive any award or contract or any part thereof . . . as to which it is determined by the [Small Business] Administration and the contracting procurement . . . agency . . . (3) to be in the interest of assuring that a fair proportion of the total . . . contracts for property and services for the Government in each industry category are placed with small-business concerns . . . ." Accordingly, whether or not there has been unnecessary or unjustified technical "bundling" within the meaning of 15 U.S.C. § 631(j)(3) and 644(e)(1), or "consolidation" within the meaning of 10 U.S.C. § 2382(b)(1) and DFARS 207.170-3(a), is not dispositive of the question of whether the Corps has fulfilled its duties under the Small Business Act. Indeed, by its express terms, the Small Business Act itself evinces an intent to subject procurements that "package or consolidate" prospective and therefore potentially "new" construction projects, to the very same burden of justification and scrutiny as other "bundled" acquisitions. Specifically, 15 U.S.C. § 644(a) requires that:

> If a proposed procurement includes in its statement of work goods or services currently being performed by a small business, and if the proposed procurement is in a quantity or estimated dollar value the magnitude of which renders small business prime contract participation unlikely, **or** if a proposed procurement for construction seeks to package or consolidate discrete construction projects, **or** the solicitation involves an unnecessary or unjustified bundling of contract requirements, as determined by the Administration, the Procurement Activity shall provide a copy of the proposed procurement to the Procurement Activity's Small Business Procurement Center Representative . . . explaining . . . . (3) why the proposed acquisition cannot be offered so as to make small business participation likely, (4) why construction cannot be procured as separate discrete

projects, or (5) why the agency has determined that the bundled contract (as defined in section 632(o) of this title) is necessary and justified . . . ."
(Emphasis added). Significantly, the provision that addresses "packaged" or consolidated construction projects was added to the Small Business Act in 1990 when Congress initially addressed the issue of the bundling of contracts in Section 208 of the Small Business Administration Reauthorization and Amendments Act of 1990, Pub.L. 101-574.
As can readily be seen from the use of the disjunctive connector "or," the "packaging" or "consolidation" of discrete construction projects is subject to the same scrutiny under the statute as otherwise "bundled" contracts, and is addressed separately from the situation in which the goods and services procured are "currently being performed by a small business." That the "packaging or consolidation of discrete construction projects" is not subject to any requirement of "being currently performed" by a small business is confirmed by the corresponding SBA regulation, 13 CFR 125.2(b), which, like the Small Business Act, requires justification:
. . . whenever a proposed acquisition strategy:
(i) Includes in its description goods or services currently being performed by a small business and the magnitude of the quantity or estimated dollar value of the proposed procurement would render small business prime contract participation unlikely;
(ii) Seeks to package or consolidate discrete construction projects; **or**
(iii) Meets the definition of a bundled requirement as defined in paragraph (d)(1)(i) of this section.
13 CFR 125.2(b)(3)(i)-(iii). See also FAR 19.202-1(e), which likewise uses the disjunctive when requiring that justification must be provided if:
(i) The proposed acquisition is for supplies or services currently being provided by a small business and the proposed acquisition is of a quantity or estimated dollar value, the magnitude of which makes it unlikely that small businesses can compete for the prime contract;
(ii) The proposed acquisition is for construction and seeks to package or consolidate discrete construction projects and the magnitude of this consolidation makes it unlikely that small businesses can compete for the prime contract; **or**
(iii) The proposed acquisition is for a bundled requirement . . . .
(Emphasis added). See also similar use of the disjunctive in 13 CFR 125.2(b)(4)(i)-(ii) and 48 CFR 19.202-1(e)(2)(i)-(v), describing the justification required in essentially the statutory terms.
The procurement strategy represented by the current solicitation is diametrically opposed to the overriding legislative mandate to facilitate competition by small business concerns, to eliminate obstacles to their participation, and to assure that a fair proportion of total contracts are in fact placed with small business concerns, under 15 U.S.C. §§ 631(j)(1)-(2) and 644(a) and 13 CFR 125.2(d)(2)(i)-(ii). Defendant has failed, moreover, to provide the requisite justification as to why construction cannot be procured as separate discrete projects, in such a way as to make *small business participation likely, as provided in 15 U.S.C.A. 644(a), quoted above. On the* contrary, the record demonstrates that the Defendant has deliberately structured this procurement in a way most calculated to exclude the great majority of small business concerns, that is, those small businesses which are not in the socially or economically disadvantaged categories.
It is instructive to note that virtually every reference made in Defendant's brief to the supposed fulfillment of its Small Business Act mandate, is a reference to its compliance with minority, HubZone, and Service Disabled Veteran Owned set-aside requirements – or else a vague suggestion that small businesses can compete in the context of joint ventures or

subcontracting situations. See, e.g., Def. Br., pp. 24-28. While concern for the disadvantaged set-aside categories is well and good, it does nothing to fulfill Defendant's broader duty under the Small Business Act to facilitate competition by the vast majority of small business entities, which are not in one of the socio-economically disadvantaged categories, and as prime contractors wherever possible. Such businesses constitute a whopping 59% or more of the relevant small business community numerically,[1] but the Defendant's so-called "accommodation" of such businesses quite clearly relegates them to subcontractor status only. Furthermore, Defendant's suggestion that businesses such as Plaintiff will benefit from the MATOC system of contracting, because each task order will be separately bonded, is illusory. (AR Tab 1, 1:92: 103: 250). Additionally, a small business in Plaintiff's category would not be able to obtain bonding for the anticipated task order workload that the Defendant believes is necessary to achieve its illusory "costs savings" under the overall MATOC contract. The only way this would be possible, as a practical matter, would be in a joint venture with a large business concern – which would not fulfill the intention of the Small Business Act any more than would relegation to straight subcontractor status, and would, at any rate, cause the small business to lose its size status by affiliation with the large business concern. 13 CFR § 121.103. Defendant appears to take the position that because Congress exempted this large majority of the small business community from set-aside eligibility under the Small Business Competitiveness Demonstration Program, ("SBCDP"), 15 U.S.C. § 644 Note, § 713(a), 717(a)-(b), 718(a), then Defendant is absolved from all necessity of complying with the other requirements of 15 U.S.C. § 631(j)(1)-(2), with respect to these businesses. See discussion at Def. Br. pp. 19-20. Such a position is transparently unreasonable.

The squeeze that is placed on the silent majority of non-socially or economically disadvantaged small businesses is not the inevitable result of the SBCDP as Defendant implies. While the SBCDP prevents the use of set-asides for this group of businesses, it clearly contemplates – given the very name of the program – that such businesses will be allowed to compete. Indeed, the Program's stated intention is to "demonstrate whether . . . the competitive capabilities of small business firms in certain industry categories will enable them to successfully compete on an unrestricted basis for Federal contracting opportunities." 15 U.S.C. § 644 Note, § 711(b)(1) (emphasis supplied); FAR 19.1001, 19.1003(a). Such a "demonstration" is hardly served, however, by a solicitation structure which places the contract unreservedly and undeniably beyond the reach of any possible small business concern. Nothing could have been further from the mind of Congress in enacting such a "demonstration" program, and nothing could provide a more compelling demonstration that Defendant's present course of issuing gigantic MATOC solicitations is diametrically opposed to the both the spirit and the letter of Congress' small business protective legislation.

Thus, far from allowing the "silent majority" small business construction firms in the United States to "demonstrate" their ability to compete, the Corps has instead issued solicitations such as this one which ensure that they will not have that ability. Predictably, the result in this

[1] The Corps' "market research" in support of this procurement was conducted on a regional basis for NAICS code 236220, but the Corps based its determinations concerning contractor availability on nationwide numbers. (AR Tab 24, 13-16). According to the Government's database (ccr.gov), there are 12,943 small business firms for NAICS 236220 overall, and subtracting out the socio-economic disadvantaged categories., there are at least 7,669 small businesses left (and quite likely more, as one socially disadvantaged firm may be counted in more than one set-aside category). See http://dsbs.sba.gov/dsbs/search/dsp_dsbs.cfm .

case has been that five short-listed firms were announced on May 1, 2008, who will ultimately be competing for two or more IDIQ contracts, all of whom have annual revenues of a quarter of a billion dollars or more! (These firms include BL Harbert International (annual revenue, $300,000,000), Archer Western Construction (average annual revenue last 5 years, $860,000,000), Balfour Beatty Construction, LLC (annual revenue $450,000,000), Clark/Caddell, JV (2007 revenue, $243,915,000), and Hensel Phelps (annual revenue $1,730,000,000)). (The short was published in FedBizOpps.gov).

Despite its actions to the contrary, it is fully within the power of the Defendant to comply with the statutory mandate regarding the promotion of small business participation in DoD construction procurements. The only thing standing in the way is Defendant's self-proclaimed desire to achieve economies of scale, regardless of whether the achievement of that goal places it in conflict with the small business laws. The Defendant's choice to ignore Congressional policy in favor of its own objectives should not be countenanced by this Court.

In the course of its argument concerning the above in its opening brief, Plaintiff made the comment that if Defendant had been sincere about wanting to promote the interests of the silent majority small business firms, it could have sought an exemption from the restrictions on setasides

imposed under the Small Business Competitiveness Demonstration Program. Defendant counters that under the provisions of FAR 19.1007(b)(1), an agency may only "reinstate the use of small business set-asides as necessary to meet their assigned goals, but only within organizational units that failed to meet the small business participation goal." See Def. Br. pp. 28-29 Defendant also coyly responds that Plaintiff has not shown that Defendant was not meeting its goals, and accordingly, has not demonstrated that a waiver would have been possible. Such an argument fails on a couple of bases. First of all, completely aside from the provision of FAR 19.1007 regarding "reinstatement" of small business set-asides generally, it is always open to an agency to seek a deviation from any provision of the FAR, under FAR 1.402, "when necessary to meet the specific needs and requirements of each agency." See also FAR 1.403 -1.404. If the Defendant were sincerely troubled by the fact that its acquisitions policy completely emasculates the opportunities for competition that were intended for firms such as Plaintiff under the SBCDP, then seeking such a waiver would be one possible means of demonstrating that concern. Defendant, however, prefers to continue boldly with its policy of destroying, wholesale, small business opportunities, even in the face of Congress's clear, contrary intent.

Secondly, Plaintiff respectfully submits that the latest available published statistics, which are for fiscal year 2006, show that the Corps is indeed failing to meet its goals. Specifically, 37.35% of the Corps' prime contracts were awarded to small businesses generally, as against a 2006 target goal of 43%. This is by way of contrast with the Corps performance in the set-aside categories: 14.96% against a goal of 16.5% for small disadvantaged businesses, 5.47% against a goal of 5.7% for women-owned small businesses, 10.07% against a goal of 8.0% for HUB zone businesses, and 1.48% against a 1.5% goal for service-disabled, veteran owned small businesses. See http://www.hq.usace.army.mil/hqsb/Goals/Goals_Stats.htm. All of this merely serves to illustrate what Plaintiff has been arguing consistently in its submissions to the Court – that Defendant is failing to honor its duties toward the great majority of small businesses which do not fit within one of the specially disadvantaged set-aside categories. What it also demonstrates, moreover, is that reinstatement of small business set-asides for the silent majority could have been sought had the Defendant so chosen, because the Defendant has not

been meeting its goals with respect to such businesses.

Finally, even with respect to the specific provisions of law which depend upon the special terms, "bundling" and "consolidation," Defendant's reading of the terms is unreasonably narrow in light of both the statutory language itself and the manifest intent of Congress. "Bundling," for example, is defined in 48 C.F.R. 2.101 as:

(1) Consolidating two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, into a solicitation for a single contract that is likely to be unsuitable for award to a small business concern due to–

(i) The diversity, size, or specialized nature of the elements of the performance specified;

(ii) The aggregate dollar value of the anticipated award;

(iii) The geographical dispersion of the contract performance sites; or

(iv) Any combination of the factors described in paragraphs (1)(i), (ii), and (iii) of this definition.

(2) "Separate smaller contract" as used in this definition, means a contract that has been performed by one or more small business concerns or that was suitable for award to one or more small business concerns . . . .

See also similar definition in the SBA regulations at 13 CFR 125.2(d)(1).

"Consolidation," under 10 U.S.C. § 2382(c)(1) is similarly defined as "a use of a solicitation to obtain offers for a single contract or multiple award contract to satisfy two or more requirements of that department, agency, or activity for goods and services that have previously been provided to, or performed for, that department, agency, or activity under two or more separate contracts smaller in costs than the total cost of the contract for which the offers are solicited." Thus, the two definitions are quite similar, the major difference being that § 2382(c) does not require that the smaller contracts must have been previously performed by, or suitable for, small business concerns specifically.

According to Defendant, both definitions require that the contracts being "bundled" or "consolidated" must relate to the exact same goods and services previously rendered. Also according to Defendant – aided and abetted by a misapplication of an SBA regulation – no construction project can ever satisfy that standard because construction upon land is always unique and always "new." See Def. Br. pp. 16-17.

With all due respect, such an interpretation is unreasonably narrow, and in clear conflict with the enabling legislation itself. To begin with, all contracts for future goods and services are, ultimately, for "new" ones. The Corps' insistence that each construction project is necessarily so "new" that the associated contract cannot be described as "previously" provided or performed, rings especially hollow in light of its argument that such projects may be procured on an IDIQ basis. As the name itself implies, an IDIQ contract is for an "indefinite quantity" of something. See 10 U.S.C. § 2304d(1); FAR 16.501-1, 16.501-2, 16.504(a). The use of the term "quantity" clearly implies that the individual units to be procured under subsequent task orders are for similar items of service. Indeed, the FAR goes on to provide that "[t]he contracting officer should use an indefinite-quantity contract only when a recurring need is anticipated." 48 CFR 16.504(b) (emphasis supplied). Surely such concepts are diametrically opposed to the interpretation of each constituent project as new and unique, so as not to be fairly encompassed within the concept of "bundling" or "consolidation."

It is true that in the context of another aspect of the small business legislation, the SBA has held that "[c]onstruction contracts, by their very nature (e.g., the building of a specific

structure), are deemed new requirements" and therefore cannot be deemed to have been "previously performed" by a small business concern or indeed anyone else. See 13 C.F.R. § 124.504(c)(1)(ii)(A)-(B). This rule, however, does not directly interpret the statutory and regulatory provisions at issue in this case. Indeed, it does not directly interpret any statutory language at all. On the contrary, §124.504 is concerned only with the Small Business Administration's own self-created policies governing the circumstances in which it will "accept a procurement for award as an 8(a) contract" – that is, a contract in which the SBA itself undertakes the role of prime contractor and then subcontracts the work to one or more socially disadvantaged small businesses. See 15 U.S.C. § 637(a)(1). It is the SBA's policy to accept such procurements for award as section 8(a) contracts only if such agency action will not have an "adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs." 13 CFR 124.504(c). Still interpreting its own discretionary policies, and not statutory provisions, the SBA in this regulation goes on to conclude that "[t]he adverse impact concept is designed to protect small business concerns which are performing Government contracts awarded outside the 8(a) BD program, and does not apply to follow-on or renewal 8(a) acquisitions." Id. In line with this, further, subsection (c)(i) provides for a presumption of adverse impact if a small business concern has actually been recently, and for at least two years, performing the "specific requirement," and if this performance has accounted for at least 25% of the small business' annual gross sales. It is only then that the regulation in question goes on to provide that:

(ii) Except as provided in paragraph (c)(2) of this section, adverse impact does not apply to "new" requirements. A new requirement is one which has not been previously procured by the relevant procuring activity.

(A) Where a requirement is new, no small business could have previously performed the requirement and thus, SBA's acceptance of the requirement for the 8(a) BC program will not adversely impact any small business.

(B) Construction contracts, by their very nature (e.g., the building of a specific structure), are deemed new requirements . . . .

13 CFR 124.504(c)(1)(ii).

Several things are clear from the narrative provided above. First of all, the SBA's definition of a "new" requirement in 13 CFR 124.504(c)(1)(ii) has little bearing on the question before the Court in the instant case, which is how to interpret the statutory definitions of "bundling" and "consolidation" – neither of which anywhere references the word "new." Given these facts, the coincidental use of the words "previously performed" is entitled to little or no weight when construing the meaning of bundling and consolidation in another statutory context. See Lengerich v. Dept. of Interior, 454 F.3d 1367, 1372 (Fed.Cir. 2006), citing Gose v. U.S. Postal Service, 451 F.3d 831, 833 (Fed.Cir. 2006) (to merit deference, an agency's interpretation must have been directed to language that is unclear and my not be plainly erroneous or *inconsistent with the regulation); Thomas Jefferson University v. Shalala, 512 U.S. 504, 512* (1994) (deference not due where an interpretation contrary to that espoused by the agency is compelled by the plain language or other indications of the promulgating intent). Furthermore, even if the SBA had in fact promulgated such an interpretation of the statutory language, this Court would be constrained to reject it, as contrary to the statutes' plain language. It simply will not do to interpret the wording used by Congress in such a way as to achieve an absurd result. Yet, as previously argued, an absurd result is what is achieved by using such a narrow interpretation of the words "services previously performed" as to require previous

procurement of exactly the same goods or services. The only way the Congressional wording makes any sense at all is to recognize that "services previously performed" necessarily means services similar to those previously performed. Furthermore, as previously demonstrated, the Small Business Act itself evinces an intent to subject prospective construction projects to the same requirements for justification and scrutiny as "bundled" requirements, by virtue of the clause specifically relating to construction which was added to 15 U.S.C. § 644(a) by the Small Business Administration Reauthorization and Amendments Act of 1990, P.L. 101-574, § 208, discussed above.

Defendant, nevertheless, persists in its contrary interpretation, despite the fact that its interpretation is not supported by the words or the logic of the statutes themselves. In a weak effort to bolster the argument, Defendant then resorts to the argument that its interpretation excluding all construction contracts must be correct, because Congress is presently considering legislation to specifically include construction contracts within the definition of bundling. First of all, as previously stated, Congress already included such language in the 1990 amendments. Furthermore, the argument relies upon faulty logic. When a legislative body amends a statutory definition so as to overrule an agency interpretation, this does not by any definition of logic necessarily mean that the agency interpretation which is being overruled is conceded to have been the correct one. Indeed, the proposed addition of language including combinations of "procurement requirements for construction services of a type historically performed under separate smaller contracts or orders" in the 15 U.S.C. § 632(o)(2) definition of "bundling" – see HR 1873, 110th Cong. (2007), § 101 – can be easily viewed as a legislative correction of an incorrect agency interpretation of the original language, rather than an acknowledgment that the statute originally excluded such contracts, as the Defendant seeks to claim here.

This is borne out by the legislative history, wherein, for every statement acknowledging that the original wording of the bundling definition has been treated as excluding all construction contracts[2], there are other statements indicating that such interpretations were "loopholes" to be

[2] See, e.g., H.R.Rep. 110-111(I), April 26, 2007, p. 10 ("The definition requires that closed and that the intended meaning had to be "clarified." See, e.g., H.R.Rep. 110-111(I), April 26, 2007, wherein it is stated:

Title I strengthens the definition of contract bundling by closing loopholes in the definition, adding construction services to those contracts that are subject to a bundling analysis mandated by 15(e) of the Small business Act, and providing a means by which the Administrator of the SBA may obtain an independent resolution of a dispute over the propriety of a bundled contract.

Id., pp. 6-7 (emphasis supplied).

The practice of bundling contracts – combining two or more contracts into a larger single package – most often ends up pushing small firms out of the contract competition. Congress responded in 1997 with provisions in the Small Business Reauthorization Act of 1997. The new law created its own problems as ways were found to skirt its requirements. The last ten years have illustrated that additional clarification is needed.

Id., p. 9 (emphasis supplied). See also id., p. 15 (provision re-defining bundling "clarifies the definition of contract bundling and related terms); Testimony of Todd McCracken, President, National Small Business Association, House Committee on Small Businesses, at the Full Committee Hearing on Expanding Small Businesses' Access to Federal Contracts, April 19, 2007, p. 8 (indicating that by focusing "exclusively on whether one of the contracts was

previously performed by a small business," the government has adopted an "overly narrow definition" which "warps government's calculations on the prevalence of contract bundling"). Indeed, if anything at all is proved by the legislative history connected with HR 1873's passage by the House in May of 2007, it is that there is strong bipartisan disapproval of conglomerate procurements such as the one at issue here, given their adverse effects on small bundling only occurs for work that has been performed under pre-existing contracts. However, over the years, contracts evolve and new requirements emerge and this provision has resulted in limiting the contracts covered. In addition, construction contracts are not covered even though construction jobs tend to be very suitable for smaller, individual contracts . . . .") and id., p. 15 ("Under the current definition, a contract may only be considered bundled if it has been previously performed. This provision [§ 101 of HR 1873] expands the definition to include business and on competition generally, and ultimately, the taxpayer's purses and the health of the economy. As the Committee Report clearly stated:

[T] he federal government has instituted significant initiatives designed to streamline and centralize the procurement process which would lower administrative costs. Unfortunately some of these procedures ended up artificially reducing competition .... The issues the bill seeks to correct include: the increased prevalence of contract bundling of federal contracts; the miscoding of large businesses as small businesses for contract purposes or the improper use of codes to include or exclude certain businesses, the exclusion of overseas and other categories of contracts from government small business goals and programs; the lack of growth in general of small business goals; and the need for stronger incentives and enforcement mechanisms to spur the attainment of small business policy and goals. These worsening problems need to be addressed because they are central to maintaining fair competition.

H.R.Rep. 110-111(I), April 26, 2007, p. 8 (emphasis supplied).

Unfortunately, contracting opportunities for small businesses continue to lag and, because of the failure of the government's tracking system, are likely worse than the available data shows. Agencies pressed for time and budget dollars rely more heavily on shortcuts such as contract bundling and other procurement practices that shut small businesses out of the federal marketplace . . . .

. . . . New methods of government buying that have the potential to put taxpayer money at risk are flourishing. Government contracts are structured so that the only avenue for participation by small companies is as a subcontractor where they are generally left to the vagaries of commercial contract law. Overall, small businesses continue to lose out on federal contracts, which have negative impacts for taxpayers in the form of reduced quality and increased costs.

H.R.Rep.110-111(I), April 26, 2007, pp. 8-9.

Another indication to the Committee that bundling is increasing over the last 5 years is that despite an increase in total government contracting dollars of 60 percent since 2000, the total number of contracting actions received by small business has declined by 55 percent. Meanwhile, small business contracts continue to be phased out and combined with larger projects putting them beyond the reach of small firms. The Committee has not seen evidence that these bundled contracts are less expensive to taxpayers . . .

H.R.Rep.110-111(I), April 26, 2007, p. 9.

construction and other new work . . . .").

Accordingly, the legislative history of HR 1873 does not support Defendant's interpretation of the bundling and consolidation definitions. On the contrary, all indications are that Congress regarded the continued exclusion of construction contracts from ambit of those regulations to have been a mistaken interpretation, the result of a loophole, an effort to "skirt" the intent of Congress. On this basis therefore, as well as following a correct interpretation of the plain meaning of the statutory language itself, it is necessary to reject the Defendant's suggestion that construction contracts are not subject to the justification requirements of 10 U.S.C. § 2382, 15 U.S.C. § 644(a), 13 CFR 125.2(b)(3) and FAR 19.202-1(e). On the contrary, under each of these statutes and regulations, the Corps was required to explain why the necessary construction could not be procured as discrete projects, so as to foster the overarching policy that "[s]mall business concerns shall be afforded an equitable opportunity to compete for all contracts that they can perform to the extent consistent with the Government's actions." 48 CFR §19.202-1. As previously argued in Plaintiff's opening brief and elsewhere herein, Defendant has failed to supply any reasonable justification for its "bundling," "consolidation," or alternatively, its "packaging" of so many potentially discrete construction projects in a single, giant, MATOC procurement well beyond any possible small business involvement on the prime contractor level